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Supreme Court, U.S.
FILED
JUN 10 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

1972

UNITED STATES OF AMERICA
and
EDWARD F. JENNINGS
Special Agent,
Petitioner
Appellee

v.

LILLIAN V. COUCH
Intervenor Respondent
Appellant

Petition for writ of certiorari to the United States Circuit Court of Appeals for the 4th Circuit

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BRIEF FOR APPELLANT

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United States Constitution

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BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the 4th Circuit is set forth at page A-4. The opinion of the District Court for the Western District of Virginia is set forth at page A-7.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U. S. C. Section 1254.

QUESTIONS PRESENTED

1. Whether a taxpayer by invoking his 5th amendment privilege against self-incrimination and his 4th Amendment privilege of freedom from unreasonable searches and seizures may prevent the enforcement of an Internal Revenue Service ("IRS") summons requiring taxpayer's tax consultant to produce the personal records of the taxpayer where the records were in the naked possession of the consultant when the summons was served on him but where the taxpayer had directed him to deliver the records to the taxpayer's attorney before the issuance of the summons. (Tr 6, 32) The question of whether the tax consultant would be required to deliver his own records or his worksheets prepared from the taxpayer's records is not in issue.

2. Whether the use of a manifestly civil statute to subpoena records is permissible in a tax case in which criminal fraud has become the dominant aim of the investigation being conducted by the government.

STATEMENT OF FACTS

During the summer of 1969, Dennis L. Groves, ("Revenue Agent") an Internal Revenue Agent, commenced an investigation of the income tax returns of Mrs. Lillian V. Aleshire Couch (hereinafter referred to as "Taxpayer" or "Petitioner") for the years 1964 through 1968. He enlisted the assistance of Harold L. Shaffer, ("bookkeeper") a tax consultant, and long time employee of Mrs. Couch. Bookkeeper possessed certain work papers and cancelled checks prepared by Taxpayer in her own handwriting which she had delivered

to him in order for him to prepare her tax returns. Bookkeeper had not transferred any of the information contained in Taxpayer's records to his own work sheets. During the course of his examination, Revenue Agent determined that there was potential criminal fraud involved in the case and requested the assignment of a Special Agent to aid in the investigation.

Mr. Edward F. Jennings, ("Special Agent") a Special Agent with the Intelligence Division of the Internal Revenue Service, was assigned to the case. Special Agent observed the results of Revenue Agent's investigation and Taxpayer's records, and then proceeded to Taxpayer's residence with Revenue Agent, where he introduced himself, showed his credentials, and advised Taxpayer of her 5th Amendment rights and of her right to have an attorney present during the questioning.

Special Agent, on August 18, 1969, proceeded to Bookkeeper's office to either take or photo copy Taxpayer's records. In the meantime, Taxpayer had directed Bookkeeper her tax consultant, to turn the records belonging to her over to no one but her attorney. (Tr 32) Upon Bookkeeper's refusal to deliver the records, Special Agent issued a summons directing Bookkeeper to produce the records at 9:30 A. M. on September 2, 1969.

When Special Agent arrived at 10:10 A. M. on September 2, 1969 at Bookkeeper's office, he found that Bookkeeper had already turned the records in question over to Taxpayer's attorney, John G. Rocovich, Jr.

On January 7, 1970, the United States of America instituted proceedings to judicially enforce the sum-

mons. This appeal arises from an order of the Circuit Court affirming an order of the District Court directing John G. Rocovich, Jr., Attorney, to produce the books and records in question.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional provisions relevant to this case are the Fourth and Fifth Amendments to the United States Constitution. Federal statutes under consideration are Sections 7604 and 7606 of the Internal Revenue Code of 1954 as amended. The above amendments and statutes are set forth in relevant part in the appendix to this brief.

SUMMARY OF ARGUMENT

I. An Internal Revenue Service summons which seeks to reach the private records of a taxpayer for possible use against the taxpayer constitutes a violation of taxpayer's right to remain silent and her right to be free from unreasonable searches and seizures.

The invasion of privacy, created by a thrust for taxpayer's private records when the records are in the naked possession of taxpayer's employee discourages free communication and has a chilling effect on the conduct of the taxpayer's business affairs.

Where the taxpayer retains ownership and control of his records but where the records are in possession of taxpayer's employee, the taxpayer's privilege to prevent disclosure of the records is retained.

The Internal Revenue Service will have a more difficult task in enforcing the revenue laws if the privilege surrounding the records of a taxpayer is lost as soon as mere possession passes to taxpayer's employee.

II. The Internal Revenue Code sections under review are predominately civil statutes, intended for use in civil cases.

The Internal Revenue now seeks to use the summons power of the Internal Revenue Code to discover evidence plainly intended for use in a criminal case. Such an application of the law is not permissible in the context of the case at bar.

ARGUMENT

1

A taxpayer's private records are the written testimony of the taxpayer and the government may not obtain that testimony without taxpayer's consent in aid of an investigation which has become criminal in nature.

Taxpayer contends that the government is attempting to narrowly define the perimeter of her rights under the 4th and 5th amendments to the United States Constitution. The effect of these restrictions will be deleterious to Petitioner's position and will adversely influence the administration of the internal revenue laws.

For a number of years Petitioner had her tax returns prepared by Mr. Shaffer, a bookkeeper retained for this purpose. In order to facilitate his task, she de-

livered her personal books of account, cancelled checks, and daily register to his office for his use. Bookkeeper utilized this information and transferred it directly to the returns without assembling any worksheets of his own. He did not own any of the materials and always held and stored them subject to petitioner's right of ownership. Bookkeeper is not a Certified Public Accountant, and your petitioner has not asserted a claim of a privileged relationship in this case.

The IRS has attempted to reach these personal records belonging to Taxpayer in the face of Taxpayer's assertion of her privilege of freedom from self-incrimination and her right to be free from unreasonable searches and seizures.

The IRS contends that no such rights are applicable because the records were not in the Petitioner's immediate personal possession and that the investigation is civil and carried with it only the possibility of a criminal prosecution.

The venerable and respected case of *Boyd* vs. *U. S.* 116 US 616 (1886) established that process could not issue to compel a taxpayer to produce his personal records in contravention of the taxpayer's assertion of his rights under the 4th and 5th amendments. The records of the taxpayer are, in essence, the testimony of the taxpayer himself. To force their production would be to compel the taxpayer to be a witness against himself. In the case at bar, the government contends that as the records were not in the immediate, personal possession of the taxpayer at the time of the issuance of the summons that the privilege is inapplicable.

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The petitioner says that that is a distinction without a difference. The crucial question before the Court is who is being asked to testify.

The petitioner contends it is she who is being asked to bring forward testimony for possible use by the government against her.[1] Bookkeeper certainly is not able to testify, since he has no records of his own, he merely has in his possession records belonging to the petitioner.. All that he could deliver to the IRS would be petitioner's very own records, without being able to add or subtract anything to or from their value. He would be a delivery man only, a mere conduit through which the government could reach the mouth of the taxpayer, a result prohibited by the 4th and 5th amendments and so enunciated in *Boyd* vs. *U. S.* (Supra).

The case most similar to the one at bar is *U. S.* vs. *Graf* (CA6, 371 F2d 697, 1967). There Graf, an accountant for taxpayer, was served with a summons requiring him to deliver to the IRS "all" of taxpayer's records in his possession. Included among these were numerous books of account belonging to the taxpayer. The taxpayer intervened and objected. On appeal the Circuit Court decided, on the representation of the IRS that no criminal charges would be filed as a result of the information so discovered, that the summons was enforceable. The Court made it explicit, however, that the basis for its decision lay in the absolute freedom of the taxpayer from possible criminal charges and that the *Boyd* doctrine would not be extended to a "purely" civil pro-

[1] The law is well established that if records owned by taxpayer are in taxpayer's immediate possession her privilege protects them from the probe of the IRS. See *U S v Cohen* 388 F 2d 464, 68-1 USTC 9140 (CA 9 1967) *U S v Judson* 63-2 USTC 9658 (CA 9 1963).

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ceeding. The case at bar, as all sides concede, is not purely civil. A criminal prosecution was imminent at the time the government sought production of the records. (Tr 19 20 23) The petitioner, of course, is willing to produce all documents sought if the IRS will give its assurance the case is purely civil and grant petitioner immunity from any criminal prosecution.

The government having warned taxpayer of her rights must be assumed to have been serious about the warning. The government then should have scrupulously treated the case as a criminal one and permitted taxpayer to assert her constitutional rights by once again bringing her records into her possession. In *United States* v. *Heffner,* 420 F2d 809, 70-1 USTC ¶9152 (1970), based on *United States ex rel Accardi* v. *Shaughnessy,* 347 U. S. 260 (1954) the Court held that once the government promulgates a rule, it must scrupulously adhere to that rule or evidence obtained in contravention of the rule will be inadmissable. The Court further held the fact that the warning required by News Release No. 897 (substantially the warning given to taxpayer here) may have been more generous than that required by the Constitution was not significant. The Petitioner alleges in the case at bar the government has flaunted its own administrative dictate by attempting to circumvent taxpayer's constitutional rights by maintaining a facade of a civil case when the government itself has treated the case under the rules it has established for criminal cases.

A

The privilege against self-incrimination is the shield of the taxpayer as soon as the finger of accusation turns toward her.

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The holding enunciated in *Graf* (Supra) is similar to the result reached in *U. S. and Weaver* vs. *Kleckner* 273 F Supp 251, 67-2 USTC 9536 (1967). The IRS directed a summons to Kleckner to deliver records belonging to Logan which were then in Kleckner's possession, the purpose of the probe being to discover evidence for a contemplated criminal action against Logan. The Court correctly noted that Logan could not be compelled to produce the papers himself and that Kleckner was not the owner and hence was not compellable to deliver them. Your Petitioner contends the above result is the necessary one in cases involving possible criminal action. In the case at bar the obvious purpose of the investigation was to discover further evidence to substantiate the investigating agent's belief of the existence of criminal tax fraud. (Tr 19, 20) The Petitioner maintains that at the time the government issued the summons to the bookkeeper, its main purpose was the conduct of a criminal investigation. The finger of accusation then began to point to petitioner. The IRS has admitted as much when its agent testified that he proceeded past the point in his investigation when he suspected fraud in order to substantiate his suspicions. (TR 20) The services of an intelligence agent were then requested and the petitioner was advised of her constitutional rights. The investigation was no longer a wholly civil one. The 5th amendment is the petitioners shield and the IRS may not avoid it by trying an end run around her defense by claiming it was conducting a simple, good faith civil investigation or by avoiding the reality of the ownership of the records. Certainly it is suspicious that the next morning after having advised Taxpayer of her rights, Agents immediately proceeded to Book-

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keeper's Office to obtain the records before petitioner herself could physically recapture them.

B

The accused need not have her records in hand in order for her testimony contained therein to be privileged from the probe of the accusor. The protection afforded by the 4th and 5th amendments to the Constitution would only be an empty promise if a citizen's records are not protected in a complex, modern society.

The fact that petitioner's bookkeeper rather than petitioner had possession of the records is not relevant. Mr. Shaffer, the bookkeeper was at all times subject to her orders. He was only holding the records for petitioner as her agent and as a naked possessor of the items. The transcript demonstrates Shaffer only observed the records, he did not construct any new, independent records of his own from them. (Tr 7, 8) The petitioner concedes that any records belonging solely to Bookkeeper, even though constructed utilizing petitioners records, would be subject to process whether in her hands or his and despite her assertion of 5th amendment rights. The 5th amendment protects one from testifying against himself but not from preventing the testimony of others.[2]

The law is also clear though that a summons cannot be directed successfully against a mere possessor who has in his hands the personal records of another when the

[2] A custodian may not assert his 5th amendment privilege to quash a summons requiring he produce records of another in his possession. *Essoce of Ohio* v. *U. S.* 262 US 151 (1923); *Wilson* v *U. S.* 22 US 361 (1911).

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owner asserts his privilege under the 5th amendment. The case of *U. S.* vs. *Guterma* 272 F2d 344 (CA 2, 1959) dealt with a similar situation although the Court there was careful to note that the factual situation is not of importance, but rather of the utmost importance is the question of to whom the seizure is finally directed. Guterma kept his records in a safe on Jacobs' premises. The government directed a summons to Jacobs ordering him to deliver the materials to it. Guterma then intervened and asserted his 4th and 5th amendment rights. The Court appropriately looked through the facade of mere possession and held that ultimately Guterma himself was the object of the summons and thus it was not enforceable. The constitutional intent to throw a protective screen around the individual is the fundamental factor, not the technicalities of possession.

The basic legal condition emerges that the owner, the individual to whom the summons is ultimately directed, can quash a summons which has been served on another party who is a naked possessor of the first party's own records. The dilemma in such a situation can easily be resolved by asking "If the papers were in the hands of their owner would they be privileged?" If the answer to that question is "yes" then the government should not be allowed to circumvent the rights of the owner for the sole reason that ownership and possession do not happen to coincide in one individual at the time the summons is served.

The basic principle that a subpoena should be directed to the owner rather than a naked possessor has been recognized earlier in *Schwimmer* vs. *U. S.* 232 F2d 855 (CA8, 1956). Attorney Schwimmer had closed

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his law offices and stored his files together with those of his clients at the Dean Rubber Manufacturing Company. In the course of an investigation into alleged bribery and tax matters, the government directed a subpoena to Dean requiring that it deliver up all of the records in its possession. Schwimmer thereupon intervened asserting his right to be free from unreasonable searches and seizures but not his right of freedom from self-incrimination. The Court decided that the subpoena was ultimately directed to Schwimmer himself although it was technically served on Dean. Schwimmer therefore, had a right to intervene and was able to successfully assert his 4th amendment rights. The Court looked to the rights of the owner and did not become confused by the happenstance of mere possession saying, at 861, "Schwimmer legally had such possession, control, and unrelinquished personal rights in the books and papers as not to enable the question of unreasonable search and seizure to be escaped through the mere procedural device of compelling a third party naked possessor to produce and deliver them." The case at bar does not materially differ from Schwimmer. In each the actual owner of the document should not be deprived of substantial rights when he has entrusted the records without transferring ownership to another.

The basic principles of the case at bar were laid down in *Boyd* vs. *U. S.* (Supra) The Court did not then deal with the particular possession question now before it, but if it had the Petitioner contends the result would be the same for as was said there, "any forcible and compulsory extortion of a man's own testimony or his private papers to be used as evidence to convict him of a crime or to forfeit his goods is within the condemnation of that

judgment. In this regard the 4th and 5th amendments run almost into each other," at 861.

C

The IRS will find it increasingly difficult to conduct tax investigations if the owner of records cannot assert his 5th amendment rights when they are out of his possession.

The great difficulty looming in the shadows which this case portends will be the increased difficulty of administering the Internal Revenue laws if the position of the government is maintained. The problem has apparently been noted judicially.[3] The administration of the affairs of a taxpayer has become increasingly complex and many taxpayers have become obliged to entrust their records to an individual who prepares and formulates the data in a fashion so that it is presentable to the government for revenue purposes, yet the taxpayer has not intended to strip himself of either his ownership of his documents or of his rights under the Constitution. If the taxpayer is advised that his rights are unprotected when he leaves his records with his accountant or attorney then he will have no motive to cooperate with the government when it desires to audit or investigate his tax returns by making the documents easily accessible. Instead he will gather up his records and hold them in his immediate, personal possession so as to preserve his

[3] *Stuart* v. *U. S.* 416 F 2d 459 69-2 USTC 9630 (1969)
Taxpayer permitted to assert his privilege against self-incrimination when government issued summons requiring taxpayer's bookkeeper to deliver taxpayer's records in his possession. Government had earlier requested that taxpayer deposit records with his bookkeeper in order to facilitate IRS investigation.

rights. In the long run the burden thus created will be to the detriment of both the government and taxpayer by increasing the difficulty of the government's investigation even in the case where wholly civil matters are being probed. At the very least, the taxpayer will have no reasonable assurance by leaving his records at such offices where they are easily examined that he will not be jeopardizing his rights if the suspicion of impropriety arises.

II

The sections of the Internal Revenue Code under consideration are civil laws, not criminal ones.

A

The IRS has used a civil statute to facilitate a patently criminal investigation and has misused the law. The civil law does not provide necessary safeguards present in the criminal law to protect the rights of the accused.

The Trial Court did not have jurisdiction as the use of Internal Revenue Code Section 7402 and Section 7406 in the case at bar was a manifestly criminal one while the intent of the Sections is to provide for actions manifestly civil in nature with only possible criminal overtones.

The case at bar had clearly progressed to the point where its criminal nature over-shadowed any actual civil investigation; therefore, the summons issued under Sections 7402 and 7406 of the Internal Revenue Code of

1954 was misused as the statute is a civil one, not a criminal one. This Court in *Donaldson, FKA Sweet* vs. *U. S.* et al 27 L Ed 2d 580, 400 US 517, 91 SCt 534 (1971) laid out certain guidelines for the use of the summons authorized by the above cited sections of the Internal Revenue Code which have not been adhered to in the case at bar. Your petitioner alleges that the IRS did not act in "good faith" in issuing the summons and that the clear purpose of the summons was to obtain evidence for use in a criminal prosecution. If there was any motive for discovering the supposed civil liability of the petitioner its importance had been virtually reduced to a nullity at the point in time when the summons was issued. The Court in *Donaldson* (Supra) recognizes the validity of a summons issued under Sections 7604 and 7606 where the purposes of the summons are civil with only the possibility of a criminal prosecution if the summons is issued in "good faith" and prior to a recommendation for prosecution. The petitioner contends that the action of the government agent in his carrying investigation beyond the point where he was merely suspicious of fraud to the point where his suspicions were confirmed (Tr 19) flaunts the rule enunciated in *Donaldson* (Supra) and constitutes the use of the section for the substantially single purpose of obtaining evidence for a criminal prosecution. The technicalities of the IRS procedure as to calling in a special agent are generally not crucial for the purposes of determining when the case becomes criminal, but they can be important in the context of a particular case. The intelligence agent was called into the case at bar not to ascertain the existence of tax fraud but to substantiate the alleged fraud which the first agent had already ascertained. The petitioner, contends that the Court should examine the totality of cir-

cumstances surrounding the case in order to determine whether or not the statute has been correctly utilized for its intended purpose and in accord with constitutional guarantees. It would be a trespass on the law to permit the government to maintain a civil disguise for its investigation when its agents have already determined that they are chiefly interested in criminal fraud in order for the government to utilize the readily available power of a mainly civil statute to ferret out evidence sought for a criminal prosecution.

In the case at bar, the intelligence agent stated that his main purpose in this investigation was to substantiate evidence of tax fraud which the initial investigation by another agent had ascertained. (Tr 23) The Court must look at this in light of first agent's admission that he had gone beyond the point of mere suspicion to the point of confirmed suspicion. (Tr 19) The aim of the investigation was criminal, not civil. The statute was, therefore, misapplied according to the guideline formulated for its proper use as set forth in *Donaldson*.

The Court in *Donaldson* carefully distinguished the facts of that case and noted it was not a case in which the records in the hands of the party at whom the summons was directed belonged to the taxpayer or in which the taxpayer had a proprietary interest. The line of cases from which *Donaldson* evolves all share a common fact situation: the government is attempting to have records belonging to X brought forward which are in X's possession but which relate to X's dealings with Z, the taxpayer.[4] In none of the cases did the Court find

[4] *Reisman* v. *Caplin* 375 US 440, 11 LEd 2d 459 (1964) at 466
Wild v. *United States* (362F 2d 206 at 209 (1966)
Venn v. *United States* 400F 2d 207 at 210 (1969)

that the taxpayer had established any ownership rights in the records.[5] The summons as applied to those situations, whether civil or criminal, extracts information only from the records or mouth of another party. Neither the records nor the mouth are those of the taxpayer. An exception would be those cases in which the person who has possession of the documents is the majority shareholder of the corporation which owns them or an officer of the organization which owns them.[4] When, however, the situation is reversed and the records in the hands of X belong to taxpayer then the interpretation of the code section must surely alter. The IRS is not simply asking another to tell what he knows about his business with taxpayer. The government is asking the taxpayer to disclose his own dealings. The situation whether wholly accusatory or only partially accusatory must necessarily allow the taxpayer to protect his rights. The Constitution does not drop its shield in front of the taxpayer only when he is faced with the actual indictment. It also protects him during the preparatory and investigatory stages.[6] The protections contemplated by the 4th and 5th amendments would be of little value otherwise. As the statute applies to the case at bar, then, it has been misused and is void. The government may not be permitted to use it against the taxpayer himself or his personal records.

The case at bar is analogous to *Deck* v. *U. S.* 339F2d-739. (1964). There the government directed a summons to Deck, attorney for taxpayer Kless who was under investigation, seeking to have produced certain work

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[5] *U. S. v. Roundtree* (CA5, 420 F2d 485 1969)

[6] *Miranda* v. *Arizona* 384 US 436 (1966)
Escobedo v. *State of Illinois* 378 US 478 (1964)

papers allegedly belonging to Phillips, an accountant who had prepared tax returns for taxpayer Kless. Kless intervened in the action and claimed the papers belonged to him; however, the court ruled that the work papers belonged to the accountant. The Court considered the ownership of the papers important to the outcome of the case and concluded that as ownership was in Phillips that Deck would be compellable to produce them in spite of taxpayer Kless' assertion of privilege. The inference here though is that if the papers had belonged to Kless, but in Deck's hands, they would not have been reachable via a summons. Ownership of work papers produced by an accountant was subsequently held to be determinative of whether or not the papers were reachable via an IRS summons, when in the hands of the client-taxpayer.[7]

CONCLUSION

For the reasons set forth above, your Petitioner prays that the enforcement of the summons be denied.

Respectfully submitted,

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[7] *United States v. Levy* 270 F Supp 601 at 603 (1967)

APPENDIX A

APPENDIX

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

[Amendment IV]

[Security from Unwarrantable Search and Seizure]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[Amendment V]

[Rights of Accused in Criminal Proceedings]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 7402. JURISDICTION OF DISTRICT COURTS.

* * * *

(b) *To Enforce Summons.*—If any person is summoned under the internal revenue laws to

appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony or production of books, papers, or other data.

* * * *

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry:

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named

in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

FOR THE FOURTH CIRCUIT

No. 14,546

United States of America, and
Edward F. Jennings, Special
Agent, Internal Revenue Service,

Appellees,

Versus

Lillian V. Couch,

Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Ted Dalton, District Judge.

(Decided October 12, 1971.)

Before Haynsworth, Chief Judge, and Bryan and Butzner, Circuit Judges.

John G. Rocovich, Jr., (Claude D. Carter, and Martin, Hopkins, and Lemon on brief) for Appellant, and Joseph M. Howard, Attorney, Department of Justice, (Johnnie M. Walters, Assistant Attorney General, Lee A. Jackson and John M. Brant, Attorneys, Department of Justice, and Leigh B. Hanes, Jr., United States Attorney, and James G. Welsh, Assistant United States Attorney, on brief) for Appellees.

PER CURIAM:

From 1955 until the present controversy arose, the intervenor, Mrs. Couch, regularly delivered all of her financial books, records, and documents to her accountant, Mr. Shaffer, so that he might compute and fill

out her income tax returns. These records were thereafter stored by the accountant in his office. In 1969 an Internal Revenue agent investigating Mrs. Couch's returns for the years 1964 through 1968 requested, and was permitted to review those records. During that investigation the agent became suspicious of fraudulent activity so he sought the aid of a special agent. It was customary procedure to have a special agent associated to investigate a suspected crime. Upon arrival, the special agent, Mr. Jennings, gave Mrs. Couch the *Miranda* warnings. She thereafter instructed her accountant not to permit further examination of the records.

Pursuant to authority vested in him by 26 U. S. C. A. §§ 7402 and 7604, Special Agent Jennings subpoenaed the accountant to present the records in his possession and to testify about his connected activities. Instead of complying, the accountant delivered the records to Mrs. Couch's attorney as she instructed. Thereupon, Special Agent Jennings instituted this action to enforce compliance with the subpoena. The lower court ordered the records produced, and appeal was taken from that order.

The intervenor-appellant sets out two alleged infirmities in the decision, but we find them to be without merit. She first asserts that the statutory authorization for the subpoena is strictly limited to civil suits so that its use was improper in the present case which is potentially criminal. The subpoena power is not so narrowly restricted, however, for it is well-recognized that the subpoena is proper as long as the investigation retains a legitimate civil purpose. see *Donaldson* v. *United States,* 400 U. S. 517; *United States* v. *Giordano,* 8 Cir., 419 F.2d 564; *United States* v. *Ahmanson,* 9 Cir., 415 F.2d

785; *United States* v. *Hayes,* 7 Cir., 408 F.2d 932. The District Court found after a hearing that there was "a continuing and joint investigation to ascertain the correctness of the income tax returns and the possibility of fraud * * *."

The intervenor also attempted to encompass the records within her Fifth Amendment privilege against self-incrimination. The answer to this contention lies in the fact that the records were not in the intervenor's possession but were in the custody of her accountant. She had voluntarily relinquished her control of the records. They had passed from the sphere of privilege surrounding her, for there was no accountant-client privilege. The present situation is readily distinguished from the case upon which the intervenor relies, *Stuart* v. *United States,* 5 Cir., 416 F.2d 459. The testimony there disclosed that the suspect had delivered her records to the accountant for the sole purpose of providing a more convenient time and location for conducting the pending investigation.

Affirmed.

IN THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF VIRGINIA

UNITED STATES OF AMERICA and EDWARD F. JENNINGS, Special Agent,	)	
Petitioners	)	
v.	)	
HAROLD L. SHAFFER,	)	CIVIL NO. 70-C-3-R
Respondent	)	
v.	)	
LILLIAN V. COUCH,	)	
Intervenor	)	

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The above-entitled case having come on to be heard on the petition and answers thereto, on the Order to Show Cause entered by the Court on January 7, 1970, the hearing thereon having been reset and held on February 2, 1970, and the Court having heard the testimony elicited, having examined the exhibits admitted into evidence, and having heard argument of counsel, and being fully advised in the premises, therefore enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. This is an action brought by the petitioners for the purpose of enforcing an Internal Revenue Service summons issued to the respondent, Harold L. Shaffer.

2. The petitioner, Edward F. Jennings, is a Special Agent of the Internal Revenue Service, employed in the Intelligence Division of the Office of the District Director in Richmond, Virginia, with post of duty in Roanoke, Virginia.

3. The petitioner, Edward F. Jennings, in his capacity as a Special Agent is conducting a continuing and joint investigation with Revenue Agent Dennis L. Groves for the purpose of ascertaining the correctness of the income tax returns and the possibility of fraud of Lillian V. Couch for the years 1964 through and including 1968.

4. On August 18, 1969, as part of the investigation described in paragraph 3 above, an Internal Revenue Service Summons, a copy of the original of which was admitted into evidence as Respondent's Exhibit 1, was issued by the petitioner, Edward F. Jennings, directing the respondent, Harold L. Shaffer, to appear before the said Edward F. Jennings on September 2, 1969, at 9:30 a. m. to testify and to produce for examination certain books, records, and documents all of which are described in the summons.

5. On August 18, 1969, the summons described in paragraph 4 above, was served on the respondent, Harold L. Shaffer, by the petitioner, Edward F. Jennings, by handing a copy thereof to Harold L. Shaffer.

6. That the respondent, Harold L. Shaffer, has served as the tax consultant for the taxpayer, Lillian V. Couch, from 1955 to the present and has prepared her tax returns for each year from 1955 to the present.

7. The respondent, Harold L. Shaffer, while serving as tax consultant to the taxpayer, Lillian V. Couch, received from her and thereafter maintained continuous possession of the various books, records and documents described in the summons until September 2, 1969; these records, books and documents were utilized by Harold L. Shaffer for the purpose of preparing the tax returns of Lillian V. Couch for the years 1955 to the present.

8. That on August 18, 1969, Harold L. Shaffer was in possession and custody of the books, records and documents which are described in the summons for the years 1964 through and including 1968.

9. That on September 2, 1969, the respondent, Harold L. Shaffer, refused to produce the books, records and documents and to testify as required by the summons on the ground that he had delivered the papers, etc. to Mrs. Couch's attorney.

10. That on September 2, 1969, the respondent, Harold L. Shaffer, turned over the books, records and documents requested by the summons to John G. Rocovich, Jr., the attorney for Lillian V. Couch.

11. John G. Rocovich, Jr., the attorney for the taxpayer, Lillian V. Couch, is presently and at all times since September 2, 1969, has been in possession of the

books, records and documents requested by the summons.

12. On January 7, 1970, the petitioners filed this action for the purpose of judicially enforcing the Internal Revenue Service summons.

13. The respondent filed his answer to the petition on January 19, 1970.

14. On February 2, 1970, the Court granted the motion of Lillian V. Couch to intervene.

15. It is necessary for Special Agent Edward F. Jennings to examine the books, records and documents sought by the summons described in paragraph 4 above and to take the testimony of the respondent, Harold L. Shaffer, in order to ascertain the correctness of the income tax returns and the possibility of fraud of Lillian V. Couch for the years 1964 through and including 1968.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this action pursuant to Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954, 26 U. S. C. Sections 7402 and 7604.

2. The taxpayer may intervene to assert her rights under the Fourth and Fifth Amendments to the Constitution of the United States.

3. The petitioner, Edward F. Jennings, as a duly commissioned Special Agent of the Internal Revenue

Service is empowered to issue Internal Revenue Service summonses under the authority of Section 7602 of the Internal Revenue Code of 1954, 26 U. S. C. 7602, and Treasury Regulation 301.7602-1 (26 C. F. R. 301.7602-1).

4. The Internal Revenue Service summons involved in this case was properly issued to and served upon the respondent in this case.

5. The Internal Revenue Service Summons described in paragraph 3 above, was issued as part of an investigation which is being conducted pursuant to a legitimate purpose, namely to determine the correctness of income tax returns and the possibility of fraud filed by Lillian V. Couch for the years 1964 through and including 1968.

6. That Revenue Agent Dennis L. Groves and the petitioner, Edward F. Jennings, are conducting a continuing and joint investigation to ascertain the correctness of the income tax returns and the possibility of fraud of Lillian V. Couch for the years 1964 through and including 1968.

7. A special agent of the Internal Revenue Service is empowered to issue an Internal Revenue Service summons pursuant to Section 7602 even though the evidence so obtained may ultimately be used in a criminal prosecution should one ever be instituted.

8. The records and testimony sought by the Internal Revenue Service summons are necessary, material and relevant to a determination of the correctness of the income tax returns of Lillian V. Couch for the years 1964 through and including 1968.

9. At the request of the taxpayer and after service of the summons upon him the respondent turned the records over to John G. Rocovich, Jr.

10. The respondent was in possession of the books, records and documents requested in the summons at the time of the service of summons and should have requested the guidance of the Court before taking any action with respect to turning over the records to Attorney Rocovich, (*United States* v. *Bryan,* 339 U. S. 323, 331 (1950); *Blair* v. *United States,* 250 U. S. 273, 281 (1919); *Blackmer* v. *United States,* 284 U. S. 421, 438 (1932).

11. The rights of all parties with respect to the records involved in this proceeding are fixed and determined on the basis of the rights as they existed at the time the summons was served.

12. Since no search or seizure of any books, records or documents in the possession of the taxpayer are involved in this proceeding, the provisions of the Fourth Amendment of the United States Constitution are not applicable here.

13. Since, at the time the summons was served, the taxpayer, Lillian V. Couch, was not in possession of the books, records and documents described in the summons, she may not assert any Fifth Amendment privilege against self-incrimination as a bar to the enforcement of the summons.

14. Since the records in question were turned over to an officer of this Court, namely, John G. Rocovich,

Jr., who now has possession thereof, this Court, acting under its general equity powers, may order Mr. Rocovich to produce those records on the same basis and on the same terms as it could were the records still in the possession of the respondent.

15. An order should be issued requiring the respondent to appear and give testimony with regard to the determination of the correctness of the income tax returns of Lillian V. Couch for the years 1964 through and including 1968.

Enter:

Ted Dalton

February 25, 1970

A TRUE COPY, TESTE:
Virginia M. Ayers, Clerk

By: Carolyn Brammer
Deputy Clerk

TRANSCRIPT

(Mr. Shaffer, Bookkeeper, on Direct Examination by Mr. Street).

turn them over to her attorney.

O Did you refuse to turn the records over to them before or after you received the subpoena?

A *Before, sir.*

Q At this time you refused to turn the records over to them, did you refuse to let them look at them?

A No, sir.

Q At this time then you were willing to let them look at them, but you wouldn't give them to them to take away from your office. Is that correct?

A That's correct.

MR. STREET: That's all the questions I have, Your Honor.

MR. DOWD: May I see the subpoena that is part of the record?

CROSS EXAMINATION

(of Mr. Shaffer, Bookkeeper)

BY MR. DOWD:

Q Mr. Shaffer, do you have the duplicate copy that the Special Agent gave you of this subpoena?

A Not—Not in my possession today. I have it, sir.

Q I ask you to take a look at it, Mr. Shaffer. Would you tell me if there is another page that goes on this subpoena?

A Another page?

Q Yes. I show you a blank—a blank summons which is a duplicate and ask you if you recognize that that is more akin to the summons you received from Special Agent Jennings?

A You mean this print on the back?

Q Yes.

A Yes, sir.

Q It did have this print on the back?

A Right.

Q Mr. Shaffer, how long have you been a tax consultant for Mrs. Couch?

A How long?

Q Yes.

A Up until—I don't know the exact date, sir.

Q Has it been a year, five years, ten years?

A Oh, it has been since 19__ approximately 1955, I suppose.

Q 1955?

A '55, '56.

Q I see. When you did her work, did she turn over books and records and documents to you?

A Yes, sir.

Q And from those books and records and documents, you took information and worked up her income tax return. Is that correct?

A That's right, sir.

Q Could you describe some of the documents and books and records you had in your possession?

A Bank statements, daily—daily reported sales, and the necessary information, payroll records and what have you.

Q I see. On the date that this summons was issued to you, did you have these books, records and documents in your possession?

A Yes, sir.

Q Mr. Shaffer, I want you to take another look at the face of this summons and down under the time for the return date, would you read that statement into the record, please?

A "Failure to comply . . ."?

Q That's correct.

A "Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States Commissioner to enforce obedience to the requirements of this summons, and to punish default or disobedience."

Q Were you aware of that statement when you got the summons?

A Yes, sir.

Q Did you read that statement?

A Yes, sir.

(Mr. Groves, Internal Revenue Agent, on Cross Examination by Mr. Rocovich)

I had found while working in Mr. Shaffer's office on these days, led me to this conclusion. It was at this point that the case was referred to the Intelligence Division and my superiors.

Q Well, then you say you were there three days. Did you work on them for two days, then start to suspect some impropriety and then continue for another day, just to be sure that you were right?

A Basically, I would say this is correct. I wouldn't say I worked exactly two days before I suspected anything or a day and a half or three days. It was part of this two or three day period. At the moment, I don't recall exactly how many days I worked at Mr. Shaffer's office.

Q Then you proceeded a little further, confirming your suspicions.

A This is correct.

Q Right. So after the point at which you suspected some impropriety, you continued to work for a little while. Is that right, basically?

A I referred the information to my superiors at that point.

MR. ROCOVICH: Thank you.

MR. STREET: I want to ask one more question, Your Honor.

REDIRECT EXAMINATION

(of Mr. Groves, Internal Revenue Agent)

BY MR. STREET:

Q Mr. Groves, is it true, as Mr. Dowd stated here in his objection, that you suspected fraud before you turned—before you called in Mr. Jennings? Was his statement correct?

A I wouldn't say necessarily that I suspected fraud. I found that there was, to me, a substantial understatement of gross income. It is not for me to determine whether this is fraud.

Q No, I didn't ask you if you thought there was fraud. I asked you if it was true—was his statement true, that you suspected fraud.

A This is true.

MR. STREET: That's all.

MR. DOWD: We have no further questions, Your Honor.

THE COURT: All right. You are excused.

MR. ROCOVICH: I would like to call Mr. Jennings.

THE COURT: Very well. Come around, Mr. Jennings.

(Mr. Jennings, Special Agent of Internal Revenue Service, on Direct Examination by Mr. Rocovich)
case assignment sheet?

A The source of the case was Audit Division.

Q Say anything else as to why there was suspected fraud or—

A My best recollection is that it stated that there was an understatement of gross receipts.

Q All right. Basically, what is the difference between a Special Agent and an Internal Revenue Agent?

A An Internal Revenue Agent, according to my understanding, makes audits of income tax returns, and they are concerned with determining the correct tax liability of any given taxpayer. That's generally what they do.

Q Yes.

A My primary function is to investigate the possibility of income tax fraud against the revenue of the United States.

Q Criminal fraud, that is, basically?

A Criminal fraud. Correct. Now, in conjunction with that, we investigate civil fraud also, but the primary function you asked, I believe.

Q All right. Your are familiar with Internal Revenue News Release 941, aren't you, involving warnings to taxpayers?

MR. DOWD: I object to the relevance. I don't know how it is relevant here.

(Mr. Jennings, Special Agent at Internal Revenue Service, on Cross Examination by Mr. Street)

Q But do I understand you correctly that you don't remember whether you asked him to sit there in the office and look at the records or not? Do you remember whether you asked him to allow you to remain there in the office and to look at the records, without taking pictures of them?

A My best recollection is that we asked him—

Q Do you remember specifically?

A —if we could work on—work on the records, and Shaffer replied that the taxpayer was going to get an attorney, and he couldn't let me see them.

Q He told you that he could not let you see them, period. Is that right?

A I believe that's right.

Q Are you sure?

A That's my best recollection.

Q Can you be positive?

A I can't be positive. No.

MR. STREET: Thank you, sir.

THE COURT: All right. Thank you, Mr. Jennings. You may take your seat.

Any further evidence?

MR. STREET: Your Honor, I would like to put Mr. Shaffer back on in rebuttal to that witness who was called by Mr. Rocovich.

THE COURT: All right.

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